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### Sports and Film Rights in the EU

**Citation for published version:**

Andreangeli, A & Craufurd-Smith, R, *Sports and Film Rights in the EU: The Legacy of Murphy*, 2015, Web publication/site, European Futures, Edinburgh. <<http://www.europeanfutures.ed.ac.uk/article-1379>>

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

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## Sports and Film Rights in the EU: The Legacy of *Murphy*

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Permalink: <http://www.europeanfutures.ed.ac.uk/article-1379>

Publication: 3 August 2015

Article text:

*In this event report, Arianna Andreangeli and Rachael Craufurd Smith review a recent one-day workshop considering the implications of the EU courts' Murphy judgement on sports broadcasting rights for the audiovisual sector, as well as the European Commission's Digital Single Market agenda. They write that the discussions underlined that, while the creation of a single market in digital would bring opportunities for businesses and consumers, it would also present challenges for maintaining media pluralism and cultural diversity.*

### Background

Audiovisual media constitute a key sector of the economy in Europe. The European AudioVisual Observatory [estimated](#) that in 2013 the sector earned revenues on the order of €133 billion. Successful creators are able to extract substantial revenues for their work in the form of fees for copyright licenses and performance rights.

Sports broadcasting rights represent perhaps the ultimate battleground for economic operators within the industry – with auctions attracting consistently high bids – but major film and television rights are also highly lucrative commodities. Ownership or control of these rights affords a firm considerable power in the media marketplace and, ultimately, influence over the flow of information to the public and over the degree of media pluralism.

Apart from constitutional implications relating to media diversity, the recent *Murphy* case ([C-403/08](#), [C-429/08](#)) has shown that licensing practices in the field of sports broadcasting can also threaten the integrity of the Union's internal market. This prompted the Court of Justice of the EU (CJEU) in *Murphy* to declare that the sale of rights, so as to segment the EU market along national boundaries, conflicts with the principle of the free movement of goods and services set out in the Treaty on the Functioning of the European Union.

The CJEU ruling brought dismay to licensors and those broadcasters that had secured costly exclusive rights in various rights auctions, as they saw the ruling as restricting their ability to take into account national preferences in fixing sale or retail charges and, more generally, to reap 'premium profits' in those jurisdictions where football matches are especially prized by licensees.

Pay-TV customers, on the other hand, welcomed the decision as a means to allow them to shop around for the most advantageous deal across the EU. All in all, *Murphy* has triggered intense 'soul searching' in the media industry and it raises key

questions about the continuing viability of the business models relied upon by sport and media undertakings active in these markets.

In addition to the waves that *Murphy* has sent throughout the Union and to the reactions that it has triggered in domestic courts, a lively debate has been taking shape at the policy level on the consequences of the European Commission's five-year [agenda](#) for the audiovisual sector. On 6 May 2015, the President of the Commission, Jean-Claude Juncker, unveiled the creation of a *Digital Single Market* as one of the priorities for his tenure.

It was clear from the President's statement, and also from comments by Andrus Ansip, the relevant Vice President, that the creation of a market without barriers in which digital goods and services would circulate freely within the EU was at the top of the agenda. Nevertheless, the Commission's commitment to ending policies such as geo-blocking immediately raised questions as to the consequences that a commitment to greater cross-border access to audiovisual content across the EU could have for the ongoing survival of the industry – at least in its current shape, including the present forms of licensing.

## Questions

Almost five years after *Murphy* and in light of the principles and goals underscored by the Digital Single Market agenda, it is imperative to address several questions:

- What modifications does EU law require to the way in which film and sports rights are sold in the EU? Should film rights be treated in the same way in EU law as sports rights?
- Do public service broadcasters still have a role to play in providing 'free' access to popular sports rights on television?
- What rights do subscribers to audiovisual services have to access those services when they travel within Europe? Is geo-blocking lawful?
- How can the present trend toward the concentration of ownership in the media industry be addressed and does the way in which premium sports and film rights are sold exacerbate this problem?
- Should media concentrations be accepted on grounds of suggested economic efficiencies, as claimed by NewsCorp, for instance, or should domestic or EU regulators intervene on 'legitimate interest' grounds to block or limit their scope?

## Event Workshop

On 29 May 2015, a number of practitioners, academics and stakeholders gathered together in Old College at the University of Edinburgh to discuss the issues arising from such a fluid and challenging landscape, from a legal as well as an economic and public policy standpoint. The workshop took place under the auspices of the [Edinburgh Europa Institute](#) and the discussion was guided in part by two chairs from the Scottish practice community with extensive experience in regulated industries.

The contributors addressed questions ranging from the extent to which ending geo-blocking would be germane, to the ongoing creativity in the production of

audiovisual content, to whether one of the unwanted consequences of pushing toward a single market for broadcasting rights may be greater industrial consolidation. Attention was also paid to likely developments in the existing business models in the broadcasting industry and to the ongoing debate on the future of public service obligations in the context of an increasingly integrated and competitive market for audiovisual content.

### Public Service Broadcasting

Under the chair of [Dr Bob Lane](#), Senior Lecturer in EU Law at Edinburgh Law School, the workshop began with a very insightful contribution from [Helen Arnot](#), Head of Legal and Regulatory Affairs at STV, and therefore ‘at the coalface’ of many of these discussions. She considered several questions arising from the likely impact of the Digital Single Market agenda on public service broadcasting (PSB) in an already mainly borderless market in the EU.

Helen argued that, in the UK, PSB is a fragile system which thrives on a delicate balance of benefits and obligations and it delivers visible societal gains, especially in terms of access to spectrum and promoting creativity and diversity. She also emphasised the critical role of PSB in delivering news and commentary on public affairs, both of which are very high quality and characterised by impartiality, thus boosting debate and ensuring coverage of as full a range of events as possible.

Although Helen expressed a generally positive view of the Digital Single Market agenda as a potential engine for greater choice and creative vibrancy, she also warned that, unless the ‘opening up’ promised by the agenda is accompanied by appropriate incentives to continue supporting the diversity and quality of content that PSB delivers daily (especially in regional contexts), European broadcasting will slowly morph into a much less varied and more uniform landscape.

### Broadcasting and Licensing

Questions arising from the interplay between greater openness in broadcasting markets were also examined by [Prof Karen Donders](#), Professor of Policy Analysis and European Media Markets at the Vrije Universiteit Brussel. Karen reflected on the impact that *Murphy* is likely to have (and to an extent is already having) on current licensing practices, such as geo-blocking. She argued that the seemingly inevitable move toward multi-territorial licensing, while beneficial for media conglomerates, is likely to undermine the sustainability of regional and generally smaller broadcasters. This trend could eventually lead to the exclusion of significant slices of European audiences from the consumption of valuable media content.

She warned that, although the *Murphy* ruling has been considered by some as a victory for media consumers, it may have adverse effects on the structure of the media market. In Karen’s view, the judgement’s somewhat troubling statements concerning copyright, along with the long term effects of moving toward multi-territorial licensing, might undermine values such as media pluralism and universality, which we often consider to be the distinguishing feature of the European media model vis-à-vis the American model.

## Digital Single Market and Competition

The second panel, focused on the theme *Sports, Film and TV Rights in the Internal Market*, was chaired by [Gordon Moir](#), Partner at Shepperd & Wedderburn. It comprised contributions from [Prof Ben Van Rompuy](#), Senior Researcher in the Vrije Universiteit Brussel and Consultant at TMC Asser Instituut (The Hague), and [Dr Rachael Craufurd Smith](#), Reader in EU Law at Edinburgh Law School.

In his presentation, Ben discussed several issues arising from the interplay between efforts to realise the Digital Single Market and continuing enforcement of EU competition rules. Speaking from the vantage point of both an expert in sports broadcasting rights and an academic in the field of competition policy, Ben sought to lay out the possible outcomes of the [e-commerce sector inquiry](#) and the on-going [antitrust investigation](#) into absolute territorial protection clauses in licensing agreements between major US film studios and European pay-TV broadcasters.

He argued that Jean-Claude Juncker's priorities are slowly but steadily reshaping the focus of EU antitrust policy and he presented two possible scenarios. In the first case – an 'extra-large' scenario – the Commission relies on antitrust law as an instrument to promote cross-border competition between digital content providers. In the second case – a 'small' scenario – the Commission limits itself to legalising arrangements that are not directly targeted by the *Murphy* judgement, such as territorial restraints limited to stopping active sales, and to ensuring cross-border portability of new media services.

Taking the first scenario, Ben highlighted the remedial potential of the application of EU antitrust rules as a means to alter the structure of the market and prevailing licensing practices. However, he warned that it may also result in divergent outcomes in antitrust instead of effective merger control. Examining the implications of the second scenario, he illustrated that, while contractual and licensing practices may be easier to tackle on a case-by-case basis, this approach would, in practice, have a far more limited impact and would only benefit 'expat' users and not 'resident' subscribers, who are by far the majority.

## Film and TV Rights

Rachael Craufurd Smith explored some of the many issues arising from the *Murphy* judgement and reflected on the relevance of the judgement for other audiovisual rights, notably in film and premium television. She emphasised that the judgement represents just one of the 'skirmishes' currently ongoing between regulators, including the European Commission, and major film producers and distributors. Examples include EU investigations into the way in which major US studios sell film rights on a territorial basis to pay-TV operators in the EU and the way in which digital products are sold online (as part of the e-commerce inquiry).

She considered the implications of this judgement and its aftermath for these inquiries and especially questioned the extent to which the combination of the ruling and the ongoing investigative activities could destabilise the existing business models in the industry. To date, the investigation into the sale of US film rights suggests a more limited ambition from the Commission, focusing on passive,

unsolicited sales and the portability of existing subscriptions (Ben's 'small' scenario), but the Court of Justice in *Murphy* clearly intended to attack territorial restrictions employed merely to maintain artificial price differences.

Even with the 'small' scenario, difficult questions remain regarding the boundary between passive and active sales. Debate continues on in what instances territoriality is an artificial construct – though perhaps this is less an issue in the film context, where cultural and linguistic aspects may be significant – and whether those who wish to take advantage of the 'passive' market have a *right* to access a foreign service even in the face of an unwilling provider.

### Digital Single Market Implementation

Following on from Ben's and Rachael's reflections, the third panel considered the impact of the application of competition rules on possible scenarios in *Murphy*'s aftermath. With [Michael Dean](#), Partner at Maclay, Murray and Spense, in the chair, [Dr Jonathan Galloway](#), Senior Lecturer in Law at the University of Newcastle, discussed some of the questions arising from the implementation of the Digital Single Market roadmap in a legal landscape characterised by a push toward the elimination of territorial boundaries, such as in the broadcasting industry post-*Murphy*.

Jonathan argued that the progressive elimination of geographic boundaries may overtime encourage consolidation in this market. A relatively small number of powerful players could emerge which, in turn, would be able to attract valuable content and become 'unavoidable trade partners', to the detriment of competition. He considered the extent to which this outcome might have an adverse impact on quality of broadcast content. He also highlighted the risk that quality could be side-lined, to the detriment of its availability and plurality.

### Sports Licensing

In the final contribution, [Dr Arianna Andreangeli](#), Lecturer in Competition Law at Edinburgh Law School, reflected on some of the practical effects that *Murphy* has already had on licensing, as well as on domestic litigation. Arianna remarked how the *Murphy* ruling, by enjoining *de facto* the freedom of broadcasters to organise their licensing practices according to territorial criteria, has not been without consequences. She noted that the main broadcasters affected by the ruling have rushed to find remedies in order to protect the value of their investments.

Taking the case of BSkyB (now Sky UK), she argued that the merger of the broadcaster and its German and Italian arms has enabled it to gain a foothold in very lucrative and still partly untapped markets. The paper also discussed some of the aspects of recent IP litigation in English and Scottish courts. She suggested that these actions have allowed the licensors of these rights (the English and Scottish Premier League Associations) to rely on their right to protect the integrity of their copyrighted material in order to rein in landlords and tenants that were relying on their rights acquired as a result of the *Murphy* judgement.



On that basis, Arianna proposed that this two-pronged strategy may be read as an attempt on the part of the broadcaster to limit the perceived damage that the judgement has caused to the value of its investments and as a rational response to the need for the broadcaster to adapt its industrial structure and licensing practices to the changed legal landscape that the ruling brought about.

### **Final Thoughts**

The final roundtable brought together many strands from the previous discussions and contributions. Central to the debate was the key overarching question of where the media broadcasting industry in the EU is headed. The industry is exposed to demands of openness and non-territoriality, yet it is reliant on audiences that are still very much 'language-dependent' and, more generally, culturally 'national' in their content selection.

It also became clear that, while very promising, the Digital Single Market agenda does not provide any final or convincing answers to the question of the extent to which its commitment to creating an internal (and therefore borderless) market in audiovisual services can be reconciled with values such as pluralism, democracy and the protection of the pursuit of creativity across the EU. These values, in turn, provide strong justifications for supplying 'national' content and maintaining a variety of broadcasters of differing sizes and for different audiences.

The view that seemed to emerge from the discussion was that a solution that can be 'good' for football broadcasting rights may not necessarily be as beneficial, from the standpoint of both producers and buyers of creative content, for the broadcasting of other transmissions. Overall, it was agreed that EU law is affecting the way in which media rights are sold across the EU and in individual Member State markets by leading to a progressively less geographically confined landscape, on the path to a fully integrated market.

Nevertheless, much thought is still needed to avoid undermining important fundamental values – such as the free circulation of ideas, pursuit of artistic efforts, cultural diversity, and, ultimately, free and open debate – simply for the sake of a Digital Single Market.

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